International Longshoremen's Association, AFL–CIO; and Baltimore District Council, International Longshoremen's Association, AFL–CIO[1] ***and*** **Rukert Terminals Corp.**

International Longshoremen's Association, AFL–CIO *and* Beacon Stevedoring Corp. and Rukert Terminals Corp.

International Longshoremen's Association, Local 333, AFL–CIO *and* Beacon Stevedoring Corp. and Rukert Terminals Corp.

International Longshoremen's Association, Local 333, AFL–CIO *and* Rukert Terminals Corp. Cases 5–D–270, 5–CD–271, 5–CD–272, and 5–CD–273

19 May 1983

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Co-Charging Parties Rukert Terminals Corp., herein called Rukert, and Beacon Stevedoring Corp., herein called Beacon, alleging that International Longshoremen's Association, AFL–CIO, herein called ILA; International Longshoremen's Association, Local 333, AFL–CIO, herein called Local 333; and International Longshoremen's Association, Baltimore District Council, herein called Council; collectively called the Respondents, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Employer Rukert to assign certain work to employees represented by it rather than to the unrepresented employees of Rukert.

Pursuant to notice, a hearing was held before Hearing Officer Harvey A. Holzman on 1, 2, 16, 17, and 18 June 1982.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated, and we find, that Rukert is engaged in the operation of a pier and warehousing operation in the Port of Baltimore, Maryland. During the past year, Rukert provided services to companies in interstate and foreign commerce valued in excess of $50,000. The parties also stipulated, and we find, that Rukert is now, and has been at all times material herein, an employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

The parties stipulated, and we find, that Beacon is engaged in providing stevedoring services to customers engaged in interstate and foreign commerce. During the 11 months since Beacon's inception, Beacon has provided services to customers in interstate and foreign commerce valued in excess of $50,000. The parties also stipulated, and we find, that Beacon is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Accordingly, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that International Longshoremen's Association, AFL–CIO, herein ILA; International Longshoremen's Association, Local 333, herein Local 333; and International Longshoremen's Association, Baltimore District Council, herein called Council; collectively the Respondents, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Rukert is engaged in the import and export of bulk cargos, such as ores, minerals, potash, and fertilizers. For many years, Rukert had utilized the bulk unloader cranes of the Canton Cottman Company to unload ships of cargo destined for storage in its warehouse facilities. However, in 1981, the

[1] At the hearing, the Respondents made a motion that the International be deleted from these proceedings and that the ILA Baltimore District Council should be substituted as the proper party because, they contend, at no time was this dispute referred to the International for disposition and that it was treated at all times as a local matter. The Charging Parties objected to the motion and the Hearing Officer referred the matter to the Board for a ruling. Referred also to the Board was the Charging Parties' motion to add the Council as a respondent although the Council initially was added as a party in interest.

Regarding the Respondents' motion, the record shows *inter alia* ILA Vice President Kopp participated in various meetings regarding the instant dispute between Rukert and Local 333 which were held in Kopp's ILA office. Moreover, as ILA vice president, Kopp sits on the seniority board which is derived from the STA-ILA agreement. This board oversees the functions of the dispatch office. Credible testimony was given by Beacon that the dispatcher, Jones, stated that he was directed by Kopp to deny labor to Beacon. Contrary to the Respondents, we find, from the foregoing facts, that Kopp's actions effectively involved the ILA in the dispute and that the ILA is a proper party to these proceedings.

As all parties to this dispute are in agreement that the ILA Baltimore District Council should be a respondent in this proceeding and the record reflects the Council's involvement in this matter, we hereby grant the Charging Parties' motion. Accordingly, we have amended the record where appropriate.

Canton Cottman Company was sold and its cranes were dismantled. Rukert, in order to preserve its bulk cargo business, erected its own bulk unloader crane which was completed and certified for use in April 1982. Rukert also selected and trained its own unrepresented employees to operate and maintain the crane, operation of which is the issue in the instant dispute.

In February 1981, Rukert began discussions with the Respondents regarding the operation of the crane with its own unrepresented employees based on historical port practice and custom.[2] During the summer, several meetings were held between Rukert and representatives from the ILA, the Council, and Local 333, but efforts were unsuccessful in resolving this issue.

On 1 July 1981 Beacon was formed and leased a portion of Rukert's office facilities and contracted on an as-needed basis for the use of Rukert's pier 5 and new crane for its stevedoring activities.[3] In September, Beacon became a member of the Steamship Trade Association of Baltimore, herein STA, which is a multiemployer collective-bargaining association. The STA enjoys a collective-bargaining relationship with the ILA and, *inter alia*, Respondent Local 333. Beacon by virtue of its membership in the STA also is bound to the STA-ILA agreement.

Rukert Marine, a wholly owned subsidiary of Rukert, for many years was engaged in stevedoring operations for Rukert and other shipping companies and was a member of STA. However, by the time of Beacon's formation, Rukert Marine was experiencing a decrease in its stevedoring activities and on 30 October 1981 notified the STA that it was resigning because it was going out of the stevedoring business. Unlike Rukert Marine, Rukert has never been a member of the STA and has never employed members of Local 333, but it does have a collective-bargaining agreement with ILA Local 1429 covering its warehouse employees. Local 1429 has never made a demand for the work in dispute.

In December 1981, during a meeting between Rukert, McFadden, the then president-elect of Local 333, and Brown, outgoing vice president of Local 333, an agreement was reached whereby Respondent Local 333 agreed that the operation of the crane was not ILA work and that it could be operated with non-ILA personnel. However, on 2 March 1982 McFadden informed Rukert that he had been ordered by the ILA to retract his agreement and that the Council had decided that the crane work belonged to Local 333. He then made a demand that crane work be assigned to employees represented by Local 333.

In early April 1982 Beacon contracted for Rukert's crane to unload the *Loveland 8*, which was scheduled to dock on 28 April. On 26 April McFadden contacted Rukert and inquired about operation of the crane, stating that he would not dispatch longshoremen to Beacon if Rukert operated the crane with non-ILA employees. He also informed Rukert that he "would shut down all of [their] operations." The following day, Rukert Jr., as president of Beacon, called the ILA-STA dispatch center to order laborers to work as stevedores in unloading the *Loveland 8*. B. Jones, the dispatch operator, informed Rukert Jr. that McFadden and Kopp would not permit him to refer out any laborers because of the crane dispute. Later that day, Beacon received a call from Kopp and McFadden threatening to withhold laborers because of the crane dispute. As a result, no laborers reported to Beacon on 28 April and the stevedoring operations were performed by non-ILA employees of Rukert.

B. *The Work in Dispute*

The work in dispute involves the operation of a modern grab bucket, shoreside, bulk unloader crane which requires for its operation a crew of three members per shift. One employee operates the crane to pick up ore from a ship-barge, or hold, another works the hopper-dumper which is a part of, but is located under, the crane, and the third employee works as a truck spotter under the hopper into which the ore is then discharged. These crew members are also trained in and required to perform repair and maintenance on the crane. When unloading a ship, the crane operates around the clock and the crew members rotate assignments. When the crane is idle, these employees perform preventive maintenance, specific construction, or general work on Rukert's pier.

C. *The Contentions of the Parties*

The Charging Parties contend that the disputed work should be assigned to Rukert's unrepresented employees. They assert that such an assignment is in accord with longstanding and traditional practice of employers in the Baltimore harbor area who are not party to a STA-ILA contract. Moreover, they contend that the STA-ILA agreement does

[2] Rukert's initial contact with Local 333 was by letter which, according to Rukert, was inadvertently typed on Rukert Marine stationery. In support of their contention that this was a mistake, the Charging Parties note that the letter was signed by Rukert Jr. in his capacity as president of Rukert and not as vice president, his former position with Rukert Marine.

[3] Beacon is owned and controlled in part by principals who are employed by Rukert and who have a small inherited interest in Rukert which is controlled by an irrevocable trust.

not cover shoreside bulk cranes and their operators.

More specifically, Rukert asserts that, because it is not a member of the STA, nor is it a party to the STA-ILA collective-bargaining agreement, the provisions regarding crane operators are not applicable to it. Further, whenever STA-ILA members have rented cranes from third parties, the owner of the crane supplies the operator who traditionally is not a member of the ILA.

Beacon also contends that it is a separate entity from Rukert, and because it is a contract stevedore who leases, but does not own or operate cranes or marine terminal facilities, it has no control over whom Rukert assigns to man the crane in dispute. Moreover, Beacon contends that, because of its contractual relationship with the ILA by virtue of the STA-ILA contract, this relationship pertains only to the laborers it hires when stevedoring a ship and not to crane operators. Finally, the Charging Parties contend that efficiency and economy of operations favor assignment to Rukert's unrepresented employees.

The Respondent Unions have taken several positions. First, the Respondents contend that Beacon is a successor to Rukert Marine because Beacon has taken over and expanded the stevedore operations formerly engaged in by Rukert Marine and because the same officials of Rukert Marine also own and operate Beacon. Second, the Respondents assert that Rukert and Beacon constitute a single employer because they are integrated physically, functionally, and operationally as they share the same facilities, executive officers, and clerical staff. Moreover, the Respondents argue that these two Companies have held themselves out to the public and to the Respondents as constituting one entity. Therefore, the Respondents claim that this dispute is not jurisdictional in nature but is a primary contract dispute because Rukert/Beacon as a single employer is attempting to avoid the provisions of the STA-ILA contract governing the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

With respect to the Respondents' first contention that Beacon is a successor to Rukert Marine, we have long held that in order for a successorship to be established there must be an affirmative showing of a purchase, transfer, or takeover of the predecessor's business; and a continuation of that particular operation without a hiatus or significant change with substantially the same employees. *Hudson River Aggregates*, 246 NLRB 192, 197 (1979); *Lauer's Furniture Stores*, 246 NLRB 360 (1979); *Parklane Hosiery Co.*, 203 NLRB 597 (1973); *Denzil S. Alkire*, 259 NLRB 1323 (1982). Contrary to the Respondents, the record evidence does not support their contentions. The record shows that Beacon was formed in 1981 and is owned by Norman Rukert, Jr., his sister, Mary Lynn Solomon, George Nixon, Jr., and his brother Nick Nixon. Rukert Jr. and Nixon Jr. currently are employed as president and vice president, respectively, for Rukert and as vice presidents for Rukert Marine. Rukert Marine, a wholly owned subsidiary of Rukert, was operated principally by Vice President and Chief Operating Officer John Landetta until October 1981, when Rukert's board of directors decided to close down Rukert Marine's stevedoring operations because of Landetta's illness and declining business. However, Rukert Marine still exists and is engaged in custom importing/exporting and occasionally acts as an agent for a vessel. In addition, Rukert Marine is located at Rukert's Lazaretto pier and Beacon leases space from Rukert at its pier 5 facilities. Although Beacon is engaged in the same type of business formerly engaged in by Rukert Marine and also has obtained one of Rukert Marine's former customers, there is no showing of a purchase, transfer, or takeover of Rukert Marine by Beacon nor evidence showing that Rukert Marine's stevedoring activities were assumed or continued by Beacon. Moreover, there is no evidence of any transfer or hiring of Rukert Marine's employees by Beacon. Therefore, it is clear from the foregoing findings that Beacon is not the successor to Rukert Marine. *Frank Hennigan*, 236 NLRB 1517 (1978); *Woodrich Industries*, 246 NLRB 43 (1979).

With regard to the Respondents' second contention that Rukert and Beacon constitute a single employer, we have traditionally held that any assessment of whether several business organizations constitute a single employer is dependent on four indicators: interrelation of operations, common management, common ownership or financial control, and centralized labor relations. *Sakrete of Northern California*, 137 NLRB 1220 (1962), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). *Land Equipment Incorporated*, 248 NLRB 685 (1980). In *Western Union Corporation*, 224 NLRB 274, 276 (1976), we further stated, "[I]t is well settled that a critical factor in determining whether separate legal entities operate as a single

employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control [of labor relations] is not shown. Moreover . . . such common control must be actual or active, as distinguished from potential control . . . ."

The Respondents point to the fact that Rukert and Beacon share the same facilities, that Rukert Jr. and Nixon Jr. who own Beacon are employed in high level positions by Rukert, and that they own stock in Rukert. The record is undisputed that Beacon by virtue of its contract with Rukert leases office space and clerical help. Beacon also contracts with Rukert for use of the crane in dispute whenever it has a ship to stevedore. However, the record does not show that Rukert has made any financial contribution or owns any interest in Beacon. The record does show that Rukert Jr. and Nixon Jr. own approximately 1 percent inherited interest in Rukert, which we find is hardly an amount sufficient to constitute a controlling interest, or to have an impact on Beacon's labor relations. Rukert's labor relations are controlled by Norman Rukert, Sr., who is chief executive officer and chairman of the board. Beacon's labor relations are handled by Rukert Jr. and Nixon Jr. and are governed by Beacon's participation in the STA-ILA collective-bargaining agreement. The record is undisputed that Beacon hires ILA-represented employees on a job-by-job, day-to-day basis and the number hired depends upon the total tonnage of the ship being stevedored and, while they are employed by Beacon, the provisions of the STA-ILA agreement are applied to them. Therefore, Beacon's disposition of any labor dispute is governed by the grievance procedures of the STA-ILA agreement and there is no evidence showing any involvement in this process by Rukert. From the foregoing facts, it is clear that, although Rukert Jr. and Nixon Jr. are involved in the management of both entities, there is no evidence showing that these businesses have common ownership or that their operations are functionally integrated. More importantly, the facts show that Rukert and Beacon each control its own labor relations policies. Therefore, we find that Rukert and Beacon are separate and distinct legal entities. *Soule Glass and Glazing Co.*, 246 NLRB 792 (1979), enfd. 652 F.2d 1055 (1st Cir. 1981); *Chippewa Motor Freight*, 261 NLRB 455 (1982); *Friederich Truck Service*, 259 NLRB 1294 (1982).

As was previously noted, the Respondents threatened and withheld their labor from Beacon in support of its claim for the disputed work. Since Beacon is a separate entity from Rukert, it is clear that it does not have the power to reassign the work in dispute to the Respondents. We find that the Respondents by applying pressure on Beacon in turn have applied secondary pressure on Rukert who owns and controls the work that the Respondents are demanding be assigned to their members. In these types of situations, we have previously found that Section 8(b)(4)(D) protects not only employers whose work is in dispute from threats, coercion, or restraints, but that it also "protects *any* employer against whom a union acts with such a purpose." *Longshoremen Local 911 (Cargo Handlers Inc.)*, 236 NLRB 1439, 1440 (1978). Therefore, we find that Beacon is entitled to the Act's protection to be free from coercion by the Respondents. Moreover, the unrepresented employees of Rukert who are currently performing the disputed work are a party to the dispute and a class within the meaning of Section 8(b)(4)(D).

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no contention or evidence that there exists an agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that this dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[4] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

There are no collective-bargaining agreements to which all parties in the instant dispute are signatories. The Charging Parties contend that, even assuming *arguendo* that the STA-ILA contract did apply to Rukert, the agreement does not cover shoreside bulk cargo cranes and their operators. The Respondents, relying on a single-employer or *alter ego* theory, assert that the common officers of the Charging Parties have held themselves out to the Respondents as a single entity. Furthermore, in their correspondence and in all meetings with the Respondents, the Charging Parties sought a waiver

[4] *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212, IBEW [Columbia Broadcasting System]*, 364 U.S. 573 (1961). 364 U.S. 573 (1961).

[5] *Machinists, Lodge 1743 (Jones Construction)*, 135 NLRB 1402 (1962).

from the ILA's assertion of its contractual right to the crane handling work. In addition, the issue of who would man the crane was brought up at a meeting of the Council at the Charging Parties' request and ultimately the Council ruled that the Respondents' members had the right under the contract to operate Rukert's crane.

The ILA-STA contract in section 4(g) states that:

> When shoreside cranes are used, and ships winches are not in use, it is understood and agreed that top men, normally assigned to drive winches, will work within their craft.

The Charging Parties assert that this paragraph refers to heavy lift cargo operations and that top men usually stand by while other nonrepresented operators actually operate the shoreside cranes. Further, the contract refers to job classifications such as gang carrier leaders, deckmen, and winchmen and there is no mention of shoreside crane operators in that document.

We find that even if the collective-bargaining agreement applied to Rukert, the agreement does not clearly and unambiguously cover the disputed work. Accordingly, the contract is not a significant factor in determining the dispute. However, to the extent the contract provisions favor any of the parties, we find them to be more consistent with the Charging Parties' view that the disputed work is not covered by the contract.

2. Employer and area practice

The record shows that whenever Rukert utilized the shoreside cranes of the Cottman Company before their dismantling in 1981, the Cottman Company operated the cranes on Rukert's pier with non-ILA represented employees. In addition, the Charging Parties emphasize that the practice, in the Port of Baltimore, by other companies who own their own cranes and are engaged in operating piers, or warehousing and stevedoring activities, has been to operate their shoreside bulk cranes with their own unrepresented employees and that the ILA has never claimed this work. The record shows that Rukert has not used employees who are represented by the Respondents to man its previously leased bulk cranes or to man the crane it currently owns. The record further shows that Rukert prefers to continue using its own work force who are not currently represented by any union.

Based upon the foregoing, we find that area practice as well as employer practice and preference favors an award of the disputed work to Rukert's unrepresented employees.

3. Relative skills, economy, and efficiency of operations

The record contains uncontradicted and unchallenged testimony that the unrepresented employees of Rukert are more skilled and efficient in the operation and maintenance of the bulk crane by virtue of their having received training from the manufacturer of the crane and having passed a written test regarding its operation. In addition, as employees of Rukert, they are available to perform maintenance on the crane and other miscellaneous tasks on the dock such as rebuilding parts of the pier. Furthermore, the record shows that the crane in question is more complex in both operation and functions than the container and whirly cranes operated by ILA-represented employees.

With respect to efficiency of operations, the uncontradicted evidence is that, because Rukert employees work regularly with the bulk crane, they are more sensitive to its operation and can anticipate any malfunctions, thus enabling them to avoid breakdowns or repair those that do occur quickly and efficiently to eliminate costly unloading delays. Rukert's crane operators are interchangeable and can relieve each other in the various operations of the crane, thus allowing Rukert to unload a ship on a 24-hour basis. In contrast, ILA operators are unfamiliar with this type of crane, and do not perform any maintenance work. Two crane operators for one job are dispatched by Respondents, but only one operator will work for 4 hours while the other operator will wait for his turn, as they cannot work out of their craft.

We find, therefore, that the factor of relative skills, as well as economy and efficiency of operations, favors an award to Rukert's unrepresented employees.

4. Joint board determinations, union agreements, arbitration decisions

There are no joint board determinations or union agreements apart from those noted above that provide assistance in resolving the instant dispute. The Charging Parties introduced evidence that this issue was presented in the form of a grievance by the Respondents to the ILA-STA Trade Practices Committee. This Committee ruled on May 12, 1982, that since the crane was operated by an employer not covered by the ILA-STA agreements, neither Beacon nor any other stevedore had the power or option of manning the crane. While this determination is not completely dispositive of resolving the dispute, we find, however, that this

factor weighs slightly in favor of an award to Rukert's unrepresented employees.[6]

Conclusion

Upon the record as whole, and after full consideration of all relevant factors involved, we conclude that Rukert's unrepresented employees are entitled to perform the work in dispute. We reach this conclusion relying on the expressed preference and practice of the Employer, area practice, relative skills, and efficiency and economy of operations. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Unrepresented employees of Rukert Terminals Corp. are entitled to perform the work in dispute which consists of the operation and maintenance of a modern grab bucket, shoreside, bulk unloader crane involved in the unloading of ships of bulk cargos, such as ores, minerals, potash, and fertilizers at the Employer's pier 5 in the Port of Baltimore, Maryland.

2. Local 333, International Longshoremen's Association; Baltimore District Council, International Longshoremen's Association; and the International Longshoremen's Association, AFL-CIO, are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Rukert Terminals Corp. to assign the disputed work to employees represented by those labor organizations.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 333, International Longshoremen's Association; Baltimore District Council, International Longshoremen's Association; and the International Longshoremen's Association, AFL-CIO, shall notify the Regional Director for Region 5, in writing, whether or not they will refrain from forcing or requiring Rukert Terminals Corp., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

[6] Member Hunter finds it unnecessary to consider this factor.